United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-1507

TO BE ARGUED BY
CARL O. CALLENDER, ESQ.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B
P/S

OTIS CLAY,

Plaintiff-Appellant

-against-

DOCTOR WILLIAM R. MARTIN,
DOCTOR PETER A. MANSKY, and
DOCTOR DONALD R. JASINSKI,

-and-

THE UNITED STATES SURGEON GENERAL
THE UNITED STATES ATTORNEY GENERAL
THE DIRECTOR OF THE BUREAU OF PRISONS,

-and-

THE UNITED STATES,

Defendants-Appellees

Docket Number
74-1507

APPELLANT'S BRIEF IN OPPOSITION TO THE COURT ORDER DISMISSING THE INSTANT CAUSE OF ACTION ON THE MERITS

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On The Brief:
Carl O. Callender, Esq.
Arthur Helton

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- X

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STATEMENT OF THE CASE

This is an appeal from the dismissal of the complaint on the merits at the pleading stage of the action by the district court.

Otis Clay, herein after referred to as the "plaintiff" or "prisoner", filed a complaint dated April 30, 1971 with the district court. Jurisdiction over the person of the appellees, hereinafter referred to by name, tittle or as "defendant(s)", was conferred by the service of the summons and complaint upon all of the defendants, as well as upon the Attorney General and theUUnited States Attorney for the Southern District of New York. See proof of service in record. The defendants filed an answer dated August 9, 1971 and plaintiff thereupon submitted memoranda in support of his cause. Plaintiff served on the defendants interrogatories dated August 8, 1973. Defendants answered the interrogatories on October 26, 1973 and November 16, 1973.

An order of dismissal was entered on November 20, 1973 by the district court based on the failure of the plaintiff or his attorney to appear at a pre-trial conference held in

the matter on November 19, 1973. The plaintiff or his attorney never received any notice of the pre-trial conference. See affirmation is support of motion for relief from order of dismissal dated November 26, 1973. On December 6, 1973 the district court vacated the order of dismissal entered on November 20. The order of December 6, 1973 states the residence of the plaintiff in the Southern District of New York. In compliance with the order of December 6, the attorney for the plaintiff filed a notice of appearance dated December 10, 1973, and the amended complaint dated January 3, 1974 setting forth a shot concise statement of plaintiffs claims The defendants answered with particularity on January 23, 1974.

The plaintiff demanded a jury trial of the matter on January 21, 1974. On February 6, 1974 plaintiff sought leave to file an amended complaint dated February 5, 1974. The amended complaint alleged the residence of the plaintiff in the Southern District of New York, and further alleged that the plaintiff presented a claim in writing to the appropriate federal agency which was finally denied in writing pursuant to Sections 2401(b) and 2675(a) of the Judiciary Code, 28 U.S.C.

The defendants moved to dismiss pursuant to Federal Rule of Civil Procedure 12(e) on March 7, 1974. The attorney for the defendant admitted that the amendments proposed by the plaintiff cannot cause undue prejudice or delay to the defendant. See affidavit of William S. Brandt dated February 22, 1974, denied plaintiffs application for leave to file an amended complaint. The districe court dismissed the complaint on the merits in an endorsement by Ryan J. dated March 14, 1974 stating that "...plaintiff's complaints are defective as to venue, subject matter, jurisdiction, and improper parties..." The plaintiff filed a notice of appeal to the court of appeals dated April 4, 1974 and the plaintiff was granted leave to appeal in forma pauperis.

While confined as a federal prisoner, plaintiff Otis Clay received injections of the experimental drug Naltrexone during the course of a medical experiment at the Addiction Research Center of the National Institute of Mental Health at Lexington, Kentucky. The experiment was conducted by the defendant doctors Martin, Jasinski and Mansky under the authority of the defendants Attorney General, Surgeon General and the Director of the Bureau of Prisons.

After the under taking of the operation of the

medical experiment, each of the defendants owed a continuing duty to provide for the welfare of the prisoner. The defendants breached the duty owed to the individual plaintiff prisoner by deviating from the federal statutory mandate and the operational plan of the experiment. The breach of the duty owed by each of the defendants was the proximate cause of the heart attach sustained by the plaintiff on or about June 8, 1970. The defendants herein obtained the consent of the plaintiff to participate in the medical experiment through the "misrepresentation" of the dangerous quality of the drug Naltrexone. See amended complaint dated January 3, 1974, and the proposed amended complaint of February 5, 1974.

P O I N T I

WHETHER THE FAILURE BY THE PLAINTIFF TO ALLEGE THE BASIS FOR VENUE IN THE COMPLAINT CONSTITUTES A GROUND FOR DISMISSAL ON THE MERITS, AND WHETHER IT WAS PROPER FOR THE DISTRICT COURT TO DENY PLAINTIFF'S MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT ALLEGING THE BASIS FOR VENUE?

The plaintiff is not required to allege the basis for venue in the complaint under the Federal Rules of Civil Procedure. A fortiori, the failure to make such an allegation does not constitute a ground for dismissal. Ripperger v. Allyn, 113 F.2d 332 (2d Cir. 1940) cert. denied, 311 U.S. 695 (1940); Ferraioli v. Cantor, 259 F. Supp. 842 (S.D.N.Y. 1966); Croney v. Louisville & Nashville Ry., 14 F.R.D. 356 (S.D.N.Y. 1953); 2A J. MOORE, FEDERAL PRACTICE ¶8.06 and 8.08 at 1631 and 1645 (ed. 1974).

The basis for venue in the instant case is the residence of the plaintiff in the Southern District of New York. Judiciary Code, 28 U.S.C. §§1391 and 1402 (1962). The basis for venue was not alleged in the complaint dated January 3, 1974 and plaintiff sought leave to amend the complaint so as to allege the basis for venue. Plaintiff's

motion was denied and the complaint was dismissed on the merits.

It was not proper for the district court to deny plaintiff's motion for leave to file an amended complaint alleging the residence of the plaintiff in the Southern District of New York. Leave to amend should be freely given in the absence of any undue delay or prejudice to the opposing party. Fed. R. Civ. P. 15(a); Foman v. Davis, 371 U.S. 178 (1962); J. MOORE, FEDERAL PRACTICE ¶ 15.08 at 895 (ed. 1974).

The attorney for the defendants admitted that the amendment proposed by the plaintiff alleging residence in the Southern District of New York cannot cause undue delay or prejudice to the defendants. See affidavit of William S. Brandt, Assistant United States Attorney, dated February 22, 1974. The defendants had actual notice of the residence of the plaintiff prior to the proposed amendment. The district court should have dismissed defendants' technical objection to the pleadings in order to reach the merits of the case. Moreover, the Federal Rules of Civil Procedure do not require the plaintiff to allege the basis

for venue in the complaint.

The amendment proposed by the plaintiff alleging residence should be allowed, and the plaintiff should be afforded the opportunity to test his claim on the merits.

POINT II

WHETHER THE DISTRICT COURT HAS JURISDICTION OVER THE PERSON OF THE DEFENDANTS?

The district court said that plaintiff's complaint was "defective as to venue, subject matter, jurisdiction and improper parties..." (emphasis supplied). Endorsement of Ryan, J. dated March 14, 1974. The inclusion of the term "jurisdiction" suggests that the district court lacks jurisdiction over the person of the defendants.

The plaintiff is not required to allege jurisdiction over the person of the defendants in the complaint. Fed. R. Civ. P. 8(a). Jurisdiction over the person of the defendants in the instant case was conferred by the service of the summons and complaint upon all of the defendants, as well as upon the Attorney General and the United States Attorney for the Southern District of New York. Fed. R. Civ. P. 4(d); Judiciary Code, 28 U.S.C. §1391 (Supp. 1974).

The defendants did not assert the defense of lack of jurisdiction over the person either by motion or in the answer. Fed. R. Civ. P. 12(b)(2). The defendants thereby

waive the defense of lack of jurisdiction over the person. Fed. R. Civ. P. 12(h)(1).

The plaintiff respectfully submits that the district court had jurisdiction over the person of the defendants herein, that the comma that appears between the words "jurisdiction" in the endorsement of Judge Ryan dismissing the complaint on the merits is a typographical error, and that lack of jurisdiction over the person is not, in fact, a ground for the dismissal of the complaint below.

P O I N T III

WHETHER IT WAS PROPER FOR THE DISTRICT COURT TO DISMISS THE COMPLAINT ON THE MERITS AT THE PLEADING STAGE OF THE ACTION ON THE GROUND THAT THE DEFENDANTS WERE IMPROPER PARTIES?

While confined as a federal prisoner, plaintiff Otis Clay received the injections of the experimental drug Naltrexone during the course of the medical experiment at the Addiction Research Center of the National Institute of Mental Health at Lexington, Kentucky. The experiment was conducted by the defendant doctors Martin, Jasinski, and Mansky under the authority of the defendants Attorney General, Surgeon General and the Director of the Bureau of Prisons.

After the undertaking of the medical experiment, each of the defendants owed a continuing duty to provide for the welfare of the prisoner. The duty of each of the defendants arose from several federal statutory sources: Attorney General,[1] Crimes and Criminal Procedure, 18 U.S.C.

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1. 18 U.S.C. §4001(b)(1) and (2) provides in relevant part that: "The control and management of Federal penal and correctional institutions ... shall be vested in the Attorney General, who shall promulgate rules for the

§§4001(b)(1), 4005(a), 4041, and 4042(1),(2), and (3) (1969); Surgeon General,[2] Public Health and Welfare, 42 U.S.C. §§ 202 and 250 (1969); Director of the Bureau of Prisons,

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government thereof, appoint all necessary officers and employees ... [and] provide for ...[the] proper government, discipline, treatment, care, rehabilitation, and reformation [of the inmates].

18 U.S.C. §4005(a) provides that: "Upon request of the Attorney General, the Federal Security Administrator shall detail regular and reserve commissioned officers of the Public Health Service, pharmacists, acting assistant surgeons and other employees of the Public Health Service to the Department of Justice for the purpose of supervising and furnishing medical, psychiatric, and other technical and scientific services to the Federal penal and correctional institutions.

18 U.S.C. §4041 provides in relevant part that "The Bureau of Prisons shall be in charge of a director appointed by and serving directly under the Attorney General ...".

18 U.S.C. §4042(1)(2) and (3) provide in relevant part that ... "The Bureau of Prisons, under the direction of the Attorney General, shall ... have charge of the management and regulation of all Federal penal and correctional institutions [and shall] ... provide for the safekeeping, care, subsistence ... [and] protection of all persons convicted of offenses against the United States[.]"

[2] 42 U.S.C. §202 provides in relevant part that: "The Public Health Service ... shall be administered by the Surgeon General ..."

42 U.S.C. §250 provides in relevant part that:

Crimes and Criminal Procedure, 18 U.S.C. §§4041 and 4042(1), (2), and (3) (1969);[3] doctors Martin, Jasinski, and Mansky,[4] Crimes and Criminal Procedure 18 U.S.C. §4005(a) and Public Health and Welfare, 42 U.S.C. §250 (1969).

The duty owed by each of the defendants to Otis Clay is based on the law of the state of Kentucky as well as on federal law.[5] The law of Kentucky gives plaintiff

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"The [Public Health] Service shall supervise and furnish medical treatment and other necessary medical, psychiatric, and related technical and scientific services, authorized by ... [section 4004] of Title 18, in penal and correctional institutions of the United States."

[3]See Note 1 supra.

[4]See Notes 1 and 2 supra.

[5]Under the Federal Tort Claims Act, the district court would apply the "law of the place where the act or omission occurred." Judiciary Code, 28 U.S.C. §1346(b) (1962). In the instant case, the law of the state of Kentucky would be applied.

Sitting in diversity, the district court would also apply the law of the state of Kentucky. Judiciary Code, 28 U.S.C. §1652 (1966); Erie R.R. v. Tompkins, 304 U.S. 64 (1938); Ansback v. Greenberg, 256 S.W. 2d 1 (Ky. 1953); Wessling v. Paris, 417 S.W. 2d 259 (Ky. 1967); Arnett v. Thompson, 433 S.W. 2d 109 (Ky. 1968); Foster v. Leggett, 484 S.W. 2d 827 (Ky. 1972); See 1A J. MOORE, FEDERAL PRACTICE ¶0.305[3] at 3055 (ed 197) as to the relationship of federal and state interests herein.

a right of action based on negligence and malpractice for the breach of the duty owed by a doctor. Johnson v. Vaughn, 370 S.W. 2d 591 (Ky. 1963). The negligence of a servant is imputed to his master under the doctrine of respondeat superior. Shedd Brown Mfg. Co. v. Tichenor, 257 S.W. 2d 894 (Ky. 1953). Otis Clay possesses a right of action against the defendant doctors Martin, Jasinski, and Mansky based on negligence and malpractice. Such negligence is imputed to the defendants Attorney General, Surgeon General, and the Director of the Bureau of Prisons.

The defendant United States is liable under the Federal Tort Claims Act[6]:

> "for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting in the scope of his office or employment ..." Judiciary Code, 28 U.S.C. §1346(b).

After the undertakings of the medical experiment, each of the defendants breached the duty owed to the individual plaintiff prisoner by deviating from the federal

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[6]Judiciary Code, 28 U.S.C. §§1346(1962), 2671-2680 (1965).

statutory mandate and the operational plan of the experiment. The breach of the duty owed by each of the defendants was the proximate cause of the heart attack sustained by the plaintiff.

The defendants have contended that Section 233(a) of the Public Health and Welfare, Title 42 U.S.C. confers immunity upon the defendant doctors Martin, Jasinski and Mansky, and the defendant Surgeon General. See defendants' answer to amended complaint dated January 23, 1974, and affidavit of William S. Brandt, Assistant United States Attorney, dated February 22, 1974. Section 233 was approved on December 31, 1970 as an amendment to the Emergency Health Personnel Act of 1970. Pub. L. No. 91-623, 84 Stat. 1868. The purpose of the Emergency Health Personnel Act is to alleviate the shortage of medical service in critical areas.

Section 233(a) provides that:

> "The remedy against the United States provided by sections 1346(b) and 2672 of Title 28, or by alternative benefits provided by the United States where the availability of such benefits precludes a remedy under section 1346(b) of Title 28, for damage for personal injury, including health,

> resulting from the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigation, by any commissioned officer or employee of the Public Health Service while acting within the scope of his office or employment, shall be exclusive of any other civil action or proceeding by reason of the same subject-matter against the officer or employee (or his estate) whose act or omission gave rise to the claim" (emphasis supplied).
>
> Public Health and Welfare, 42 U.S.C. §233(2) (Supp. 1974).

It does not appear from the record in the instant case whether the defendant doctors Martin, Jasinski and Mansky were employees of the Public Health Service when the plaintiff's cause of action arose. If the defendant doctors were employees of the Public Health Service at that time, it does not appear from the record that they, or the defendant Surgeon General, were acting within the scope of their office or employment. Accordingly, the cause should be remanded to the district court for further fact finding as to the issue of the nature and scope of the office or employment of the defendant doctors and Surgeon General.

Moreover, Section 233 was approved on December 31, 1970. The plaintiff's cause of action arose when he

sustained the heart attack on or about June 8, 1970, more then six months prior to the approval of Section 233. Exceptions to the broad waiver of governmental immunity from liability embodied in the Federal Tort Claims Act are to be construed narrowly. Dalehite v. United States, 346 U.S. 15 at 31 (1953); Rayonier Inc. v. United States, 352 U.S. 315 at 319 (1957). Section 233 confers immunity against the backround of the broad waiver of immunity embodied in the Federal Tort Claims Act. The principle of the narrow construction of such exceptions requires that Section 233 be applied only prospectively and not retroactively in the instant case.

The courts have evolved a principle of immunity from liability for federal officials who commit wrongful acts in the course of performing discretionary functions within official duties. Spalding v. Vilas, 161 U.S. 483 (1896); Barr v. Matteo, 360 U.S. 564 (1959); Gregoire v. Biddle, 177 F 2d 579 (2d Cir. 1949) cert. denied 339 U.S. 949( ).

The nature of a discretionary function has no where been fully defined:

> "There is no litmos paper test to distinguish acts of discretion ... [T]o require a finding of "discretion" would merely postpone, for one step in the process of reasoning, the determination of the real question --------- is the act complained of the result of a judgment or decision which it is necessary that the Government official be free to make without fear or threat of vexatious or fictitious suits and alleged personal liability?" Ove Gustavsson Contracting Co. v. Floete, 299 F. 2d 655 at 659 (2d Cir. 1962) cert. denied 374 U.S. 82 ( ).

To characterize acts or omissions subsequent to the undertaking of the medical experiment to the individual plaintiff prisoner as discretionary for the purpose of invoking official immunity would serve to subject federal prisoners to essentially unreviewable human experimentation.

The policy considerations behind the principle of immunity involve a balancing of interests between the use of tort liability to redress wrongs, and the effect that potential tort liability has on the effective administration of public affairs. The underlying issue on this appeal involves whether federal prisoners can be used as subjects for laboratory experiments. It is for the court through the use of tort liability to fashion standards with

due regard to the ethical considerations of experimentation on federal prisoners. See Mulfact's Experimentation on Human Beings, 20 Stan. L. Rev. 99 (1967).

The benefit to society derived from the protection of the individual federal prisoner who is subject to medical experimentation outweights the possibility of the deterrence of official action by the defendants herein. c.f. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 456 F. 2d 1339 at 1346 (2d Cir. 1972). In fact, the plaintiff submits that the judicial review of the action of the defendants herein is required by the public policy considerations underlying this appeal.

It does not appear from the record in the instant case whether the defendants were performing discretionary functions within official duties when the plaintiff's cause of action arose. The functions of the defendant doctors Martin, Jasinski, and Mansky after the undertaking of the medical experiment to the individual prisoner plaintiff were almost certainly ministerial. Accordingly, the cause should be remanded to the district court for further fact finding as to the nature of the functions and duties of the defendants.

Moreover, as to the arguments set forth above, misjoinder of parties is not a ground for dismissal of an action. Fed. R. Civ. P. 21.

POINT IV

WHETHER THE DISTRICT COURT HAS JURISDICTION OVER THE SUBJECT MATTER OF THE INSTANT CASE?

There are two bases for jurisdiction over the subject matter of the instant case. The first basis for jurisdiction is diversity of citizenship. Judiciary Code, 28 U.S.C.§1332 (1966). The plaintiff and the defendants herein are citizens of different States and the matter in controversy exceeds the sum or value of $10,000, exclusive of interests and costs.

The second basis for jurisdiction is the Federal Tort Claims Act. Judiciary Code, 28 U.S.C. §§1346 (1962 and 2671-2680 (1965). A Civil suit can be instituted against citizens who are government employees and who commit personal torts in the course of employment notwithstanding the Federal Tort Claims Act. W. WRIGHT, THE FEDERAL TORT CLAIMS ACT 77 (1957) and authority cited therein.

The Federal Tort Claims Act applies to "employee[s] of the Government while acting within the scope of his office or employment..." Judiciary Code 28 U.S.C.§1346(2)(b)(1962).

Whether government employees were acting within the scope of their office or employment when the cause of action arose is a jurisdictional issue to be determined by the district court after evidence has been adduced by the parties. W. WRIGHT, THE FEDERAL TORT CLAIMS ACT 66 (Supp. 1959). The record in the instant case does not show that any evidence was adduced by the plaintiff and defendants for the determination by the district court of whether the defendants were government employees acting within the scope of their office or employment when the cause of action arose. Accordingly, the cause should be remanded to the district court for further fact finding as the nature and scope of the employment of the defendants.

A federal prisoner can maintain an action under the Federal Tort Claims Act notwithstanding any contrary state law. United States v. Muniz, 374 U.S. 150 (1963).

The defendants herein have asserted affirmative defenses based on the "discretionary function" and "misrepresentation" exceptions under the Federal Tort Claims Act.[8]

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8. 28 U.S.C. § 2680(a) and (h) provides in relevant part that: the provisions of this chapter and section 1346 (b) of this title shall not apply to--

(a) Any claim based upon an act or omission of an

Judiciary Code, 28 U.S.C. §2680 (a) and (h) (1965). See Defendants' answer to amended complaint dated January 23, 1974. After the undertaking of the medical experiment each of the defendants breached the duty owed to the individual plaintiff prisoner by deviating from the federal statutory mandate and the operational plan of the experiment. It is almost certain that the functions and duties of the defendants were non-discretionary. Dalehite v. United States, 346 U.S. (1953); Indian Towing Company v. United States 350 U.S. 61 (1955); Gibson v. United States, 457 Fed. 1391 (3rd Cir. 1972)

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omission of an employee of the Government, exercising due care in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(h) Any claim arising out of misrepresentation.

White v. United States, 317 Fed. 13 (4th Cir. 1963). To find discretion in the exercise of the function and duties of the defendants herein after the undertaking of the operation of the experiment to the individual plaintiff prisoner reduces federal prisoners the status to unprotected subjects for laboratory experiments. In Hendry v. United States, 418 Fed. 774 (2d Cir. 1969). See Point III Supra. Accordingly, the cause should be remand to the district court for further fact finding as to the nature of the function and duties of the defendants.

The defendants herein obtained the consent of the plaintiff to participate in the medical experiment through the misrepresentation of the dangerous quality of the drug Naltrexone. The misrepresentation obviates the purported consent of the plaintiff prisoner. See also Mulford, Experimentation on Human Beings, 20 Stan.L. Rev. 99 at 106 (1967) as to the preclusion of voluntary consent from prisoners. However, the misrepresentation does not concern the underlying cause of action which is based on negligence and malpractice.

Ingham v. Eastern Air Lines Inc., 373 F.2d 227 (2d Cir. 1967) cert. denied 389 US 931 (1967).

The defendants herein have further asserted affirmative defenses based on the failure of the plaintiff to allege in the complaint that the plaintiff presented a claim in writing to the appropriate federal agency which was finally denied in writing pursuant to Sections 2401(b) and 2675(a) of the Judiciary Code, 28 U.S.C.[9] The plaintiff sought leave to file an amended complaint alleging compliance with Sections 2401(b) and 267(a) of the Judiciary Code, 28U.S.C. Plaintiff's motion

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[9]28U.S.C.§ 240(b) provides that: "Tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented".

28U.S.C.§ 2675(a) provides that: An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant

was denied and the complaint was dismissed on the merits.

It was not proper for the district court to deny plaintiff's motion for leave to file an amended complaint alleging compliance with Section 2401(b) and 2675(a) of the Judiciary Code, 28 U.S.C. Leave to amend should be freely given in the absence of any undue delay or prejudice to the opposing party. Fed.R. Civ. P.15(a) Foman v. Davis, 371 US 178 (1962). J.MOORE, FEDERAL PRACTICE ¶15.08 at 895 (2d ed. 1974). Further, leave to amend should be freely granted to cure the failure to allege jurisdiction properly. Fed. R. Cir.P 15(a). Judiciary Code, 28 U.S.C.§1653 (1966);3J. MOORE, FEDERAL PRACTICE ¶ 15.08 at 945 N. 2 (2d ed. 1974).

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any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

The attorney for the defendants admitted that the amendment proposed by the plaintiff alleging compliance with Sections 2401(b) and 2675(a) of the Judiciary Code, 28 U.S.C. cannot cause undue delay or prejudice to the defendants. See affidavit of William S. Brandt, Assistant United States Attorney, dated February 22, 1974.

The amendment proposed by the plaintiff alleging compliance with Sections 2401(b) and 2675(a) should be allowed, and the plaintiff should be afforded the opportunity to test his claim on the merits.

P O I N T V

WHETHER THE COMPLAINT CAN BE DISMISSED ON THE MERITS OF THE PLEADING STAGES OF THE ACTION PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(e) AND 41(b).

The defendants herein have contended that the order of the district court dated December 6, 1973, vacating an order of dismissal pursuant to Federal Rule of Civil Procedure 60 is an order made pursuant to Federal Rule of Civil Procedure 12(e). See affidavit of William S. Brandt, Assistant United States Attorney, dated February 22, 1974.

The order of December 6, 1973 was made in response to the plaintiff's motion to vacate an order of dismissal entered at a pre-trial conference in the matter of which the plaintiff and his attorney were never notified. The order did not point out any defects or any details to be specified beyond "a short concise statement of plaintiff's claim". A reading of the complaint filed by the plaintiff and dated January 3, 1974, shows compliance in substance with the order of the court and Federal Rule of Civil Procedure 8(a). The action cannot be dismissed on the merits as to lack of jurisdiction or vence for the failure of the

plaintiff to comply the order of December 6, 1973. Fed. R. Civ. P. 41(b).

Furthermore, the defendants cannot possibly claim that they meet the test under Federal Rule of Civil Procedure 12(e) that they cannot reasonably be required to frame a responsive pleading. On January 23, 1974, the defendants did not move before the district court for further statements.

C O N C L U S I O N

For the reasons stated above, the order of dismissal entered by the district court should be vacated, the amendments proposed by the plaintiff should be allowed, and the cause of the plaintiff should be remanded to the district court for further finding of fact.

CARL O. CALLENDER, ESQ.
Attorney for Appellant -
Plaintiff
ARTHUR HELTON
Law Student on the brief

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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OTIS CLAY,

Plaintiff-Appellant,

-against-

DOCKET NUMBER
74-1507

DOCTOR WILLIAM R. MARTIN,
DOCTOR PETER A. MANSKY, and
DOCTOR DONALD R. JASINSKI,

-and-

THE UNITED STATES SURGEON GENERAL
THE UNITED STATES ATTORNEY GENERAL
THE DIRECTOR OF THE BUREAU OF PRISONS

-and-

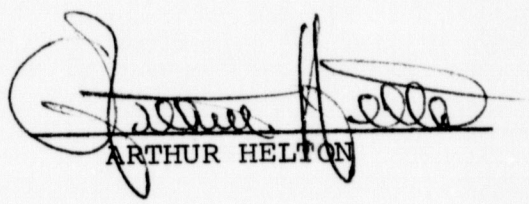
THE UNITED STATES,

Defendant-Appellees.

----------X

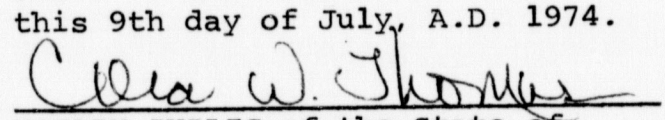
STATE OF NEW YORK)
:SS:
COUNTY OF NEW YORK)

On this day personally appeared before me, ARTHUR HELTON, to me well known, who, being by me first duly sworn, deposes and says that he is a law student employed by CARL O. CALLENDER, ESQ., attorney for the appellant-plaintiff in the above styled cause, and that on the 9th day of July, A.D. 1974, at room 331E of the United States Courthouse he personally served a true and correct copy of the brief of the appellant-plaintiff upon WILLIAM S. BRANDT, Assistant United States Attorney, the attorney of record for the defendants in said cause.



ARTHUR HELTON

Sworn to and subscribed before me
this 9th day of July, A.D. 1974.



NOTARY PUBLIC of the State of
New York
CORA W. THOMAS
Notary Public, State of New York
No. 31-9316255
Qualified in New York County
Commission Expires March 30, 1976

STATE OF NEW YORK, COUNTY OF

CERTIFICATION BY ATTORNEY

The undersigned, an attorney admitted to practice in the courts of New York State, certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

Dated:

.....

STATE OF NEW YORK, COUNTY OF

ATTORNEY'S AFFIRMATION

The undersigned, an attorney admitted to practice in the courts of New York State, shows: that deponent is the attorney(s) of record for in the within action; that deponent has read the foregoing and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. Deponent further says that the reason this verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

.....

STATE OF NEW YORK, COUNTY OF ss.:

INDIVIDUAL VERIFICATION

, being duly sworn, deposes and says that deponent is the in the within action; that deponent has read the foregoing and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true.

Sworn to before me, this day of 19

.....

STATE OF NEW YORK, COUNTY OF ss.: CORPORATE VERIFICATION

, being duly sworn, deposes and says that deponent is the
of the corporation
named in the within action; that deponent has read the foregoing
and knows the contents thereof; and that the same is true to deponent's own knowledge, except as to the matters therein
stated to be alleged upon information and belief, and as to those matters deponent believes it to be true.
This verification is made by deponent because
is a corporation. Deponent is an officer thereof, to-wit, its
The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me, this day of 19 .....

STATE OF NEW YORK, COUNTY OF ss.: AFFIDAVIT OF SERVICE BY MAIL

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at

That on the day of 19 deponent served the within
upon
attorney(s) for
in this action, at
the address designated by said attorney(s) for that purpose
y depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in — a post office — official
epository under the exclusive care and custody of the United States post office department within the State of New York.
worn to before me, this day of 19 .....

TATE OF NEW YORK, COUNTY OF ss.: AFFIDAVIT OF PERSONAL SERVICE

eing duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at

hat on the day of 19 at No.
deponent served the within
pon
ie
herein, by delivering a true copy thereof to h personally. Deponent knew the
erson so served to be the person mentioned and described in said papers as the
therein.
worn to before me, this day of 19 .....

NOTICE OF ENTRY

Sir:- Please take notice that the within is a *(certified)* true copy of a
duly entered in the office of the clerk of the within named court on 19

Dated.

Yours, etc.,
COMMUNITY LAW OFFICES
CARL O. CALLENDER, ESQ.
, of Counsel

Attorney for

Office and Post Office Address

Borough of Manhattan **New York, N. Y. 100**

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19
at M.
Dated,

Yours, etc.,
COMMUNITY LAW OFFICES
CARL O. CALLENDER, ESQ.
, of Counsel

Attorney for

Office and Post Office Address

Borough of Manhattan **New York, N. Y. 100**

To

Attorney(s) for

Index No.

UNITED STATES
FOR THE SECO

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DOCTOR WILLIAM

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COMMUNITY
CARL O. CALL

Attorney for Plainti

Office and Post Offic

176 East 106th
Borough of Manhattan
Tel. 36

To

Attorney(s) for

Service of a copy of the wit

Dated,

Attorney(s) for

Year 19

COURT OF APPEALS
OND CIRCUIT

intiff-Appellant

st-

M R. MARTIN, et.al.

d-

TATES SURGEON GENERAL, et.al.

d-
TATES,
Defendant-Appellees

LAW OFFICES
LENDER, ESQ.
, of Counsel
iff-Appellant
e Address, Telephone
Street
New York, N. Y. 100 29
9-2007

hin

is hereby admitted.

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